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August 29, 2007

VIA E MAIL AND U.S. MAIL

Louis W. Bullock
Miller, Keffer, Bullock & Pedigo LLC
222 S. Kenosha Avenue
Tulsa, Oklahoma 74120

Dear Louis:

Re: Oklahoma, et al. v. Tyson Foods, Inc., et al.

This letter is intended to memorialize defendants' serious concerns with the manner in which the State has conducted its "court-ordered scientific production." In our view, the State continues to intentionally delay the production of sampling data and related documents in an effort to deprive defendants and their experts of the time necessary to review and evaluate these materials prior to the current February 1 deadline for defense expert reports. Moreover, our review of the materials produced to date have identified numerous instances of what we believe to be incomplete or missing data or materials. The defendants' concerns, outlined in more detail below, are serious matters which must be addressed immediately by the State. The State's actions have already prejudiced the defendants to the degree that some of the deadlines in the current scheduling order will need to be revisited. Any continued delays by the State in addressing these matters will only further delay the timetable for completing this litigation.

I. The State's Obligations Under the January 5, 2007 Order

In its January 5, 2007 Order, the Court ordered the State to produce "monitoring, sampling, and testing data performed by Plaintiffs and related documents" that the State had put "at issue" in the case. *See* January 5, 2007 Order at 8. The Order also required the State to produce the documents included in its "offer of voluntary production" made during oral arguments on December 15, 2006, which was to include the following category of documents requested in Cobb-Vantress' first set of written discovery:

1. For each instance of sampling, monitoring or testing:
 - (a) the date and location of sampling;
 - (b) the name, address, and telephone number of each person involved in sampling;

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- (c) the media or material sampled, and
 - (d) all tests or laboratory analysis performed.
2. Copies of all sampling, monitoring or testing documents, which includes laboratory results, assay reports, QA/QC documents, sampling protocols, photographs, maps and site sketches.
 3. Copies of all documents relating to the scientific investigation of groundwater contamination which includes laboratory results, assay reports, QA/QC documents, sampling protocols (unless developed by an attorney), photographs, maps and site sketches.

Id. at 9.¹ The Court further ordered that the State:

shall produce all documents identified by Plaintiffs and the Court by February 1, 2007. Within one week of producing all of the documents identified by Plaintiffs and the Court, Plaintiffs shall prepare a supplemental privilege log which identifies all documents which Plaintiffs continue to claim as privileged which Plaintiffs have not produced.

Id. at 11 (emphasis added).² Finally, the Court indicated that “[a]fter the defendants have reviewed the production ordered herein and the revised privilege log... the Defendants may reurge their motion to compel further production if they think it necessary and appropriate.” *Id.*

II. State’s “Rolling” Production

The State did not complete its production of sampling data and related documents by February 1. Rather, the State has dribbled information and materials out to the defendants in seven separate installments (February 1, February 8, March 6, May 1, May 21, July 2 and August 7). In recent conversations, you have confirmed that the August 7 production is not the last production planned by the State. You further indicated that the State’s “court-ordered production” is expected to continue over the next several months. The State has refused to indicate when this production will be complete.

¹ The Court also ordered that the documents submitted by the Plaintiffs for *in camera* inspection by the Court were to be produced as being included within the Plaintiffs’ offer of voluntary production. *Id.* at 10.

² This deadline, as it pertained to the production of field notebooks, was extended to February 8, 2007 by an unopposed motion.

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In your February 1, 2007 production, you indicated that “[o]n an ongoing basis, we will be supplementing this production on the first of each month and data not included in this production will be produced as the QA/QC information is completed.” See February 1, 2007 letter from L. Bullock to R. George at 1. Nothing in the Court’s January 5, 2007 Order allows the State to withhold monitoring, sampling and testing data until it has been fully QA/QC’d. Instead, the State should have produced all monitoring, sampling and testing data by February 1 for existing data, and should have produced, on an ongoing basis, additional data as it was generated. Once QA/QC packages and validated data reports were generated, the State should then have supplemented its earlier production.

The work of Defendants and their experts in reviewing the State’s sampling data and test results can not begin in earnest until we have a complete set of the State’s data. The end result (and likely the goal) of the State’s never-ending, piecemeal, rolling production of sampling data is to limit defense experts to one or two months (at best) to review sampling data and test results which it took the State and its experts almost two years to generate. This is unacceptable to the defendants.

The State, therefore, should produce any and all monitoring, sampling and testing data, and related documents currently in its possession that have not yet been produced. Going forward, the State should produce any new data in its possession on the first of each month. The State should then supplement its production of any previously produced data as QA/QC reports and validated data reports are generated.

III. Categories of Sampling Data and Materials Still Being Withheld by the State

Obviously, defendants do not know the precise nature of all data and materials which the State has withheld. However, based on our prior conversations and information otherwise available to defendants, we are aware of several categories of data, described below, which the State is continuing to withhold. This data and related documents must be produced immediately.

A. DNA/Microbial Source Tracking Test Results

We have discussed on numerous occasions the fact that the State has collected and analyzed samples under a protocol which the State believes will allow it to “track” or “fingerprint” substances found in water back to poultry litter application sites.³ In these conversations, the State has boasted about the “revolutionary” nature of this work. It is obvious

³ See March 5, 2007 letter from R. George to L. Bullock; May 1, 2007 letter from L. Bullock to R. George; July 3, 2007 e mail from R. George to L. Bullock; August 2, 2007 e mail from Richard Garren to R. George.

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that the State views this work as central to its "scientific" case against the defendants. Despite all the rhetoric about this work, the State has refused to provide the defendants with any of the test results or documents related to the collection, handling or testing of samples under the State's "fingerprinting" protocol. Any continued withholding of these materials is highly prejudicial to the defendants.

Over the course of our discussions, the State has consistently promised to produce this data and related materials but the projected date of production varies with each conversation. Initially, you orally promised to produce this data "before the summer" of 2007. However, in your May 1, 2007 letter, you stated that "the best that I can tell you at this time is that we are within thirty to sixty days of having the [method] completed. As we have promised, once the testing methodology is completed, it will be provided to you." See May 1, 2007 letter from L. Bullock to R. George. Sixty days later, on July 3, I wrote to you again to determine the status of the State's promised production. In that e mail, I again requested a copy of the revised Standard Operating Procedure (SOP) related to the State's DNA investigation, which you had indicated would be produced soon. In addition, I reiterated our request that you immediately produce the field collection, chain of custody and laboratory analysis documents related to any prior sampling or testing that may have occurred as part of the DNA investigation. See July 3, 2007 e mail from R. George to L. Bullock.

In an August 2, 2007 e mail from Richard Garren, the State indicated that it will not produce the SOP or supporting data for its DNA investigation until sometime in September. Mr. Garren stated that he information would be withheld until "we [the State] have determined the extent to which it is possible to track poultry waste using DNA," and that it would only be produced at this indefinite future date if the parties agree upon a "suitable protective order" because the "method developed for using DNA to track poultry waste through the environment is proprietary and warrants particular protection." See August 2, 2007 e mail from R. Garren to R. George and M. Bond. Again, as explained above, the State cannot withhold the SOP or data that has been collected as part of the DNA investigation, on the grounds that the State has not yet determined whether it is useful data. Further, we do not agree that the Court's January 5, 2007 Order requires the parties to enter into a protective order before the State must produce this data.

The data related to the State's purported "DNA investigation" has been withheld for far too long. It must be produced immediately.

B. Sediment Geoprobe Groundwater Sampling Data

The defendants recently learned from a source outside of this lawsuit that the State has conducted sediment or geoprobe groundwater sampling events in the Oklahoma portion of the watershed for which we have received no data. I wrote to you about this subject in my letter of July 9, 2007. Attached to that letter was a map showing the locations where these samples were

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reportedly collected. The State still has not produced the data and documents related to these sampling events.

In his August 2, 2007 e mail, Mr. Garren confirmed that the samples at issue were geoprobe groundwater samples collected pursuant to the SOP at Bates Number STOK 0022191. See August 2, 2007 e mail from R. Garren to R. George. In that e mail, Mr. Garren stated that the geoprobe data will be produced "after the lab has done its analysis, and CDM's internal lab has completed its QA/QC." *Id.* As explained above, the Court's January 5, 2007 Order does not allow the State to delay production pending completion of the QA/QC process. Instead, the State should produce this geoprobe data now, and should supplement its production once the QA/QC process is complete.

C. Data and Sampling Documents Still Listed on the State's Revised Privilege Log

On February, 8, 2007 the State produced a revised privilege log. Included on that privilege log were the following items:

Item No. 213. Digital data, GIS (ArcView) files for the Illinois River Watershed and immediately surrounding areas from 2004 and 2005, authored by Lithochimeia, Inc.

Item No. 214. Digital data, analysis of agricultural census data for Arkansas and Oklahoma, authored by Lithochimeia, Inc.

Item No. 215. Field notes, sediment sampling locations from 2005, authored by Lithochimeia, Inc.

Item No. 216. Photographs and digital photographs with included text, sediment sampling locations from 2005, authored by Lithochimeia, Inc.

Item No. 217. Standard Operating Procedures (SOPs), Section 5.3 and portions redacted.

Item No. 218. Manure sampling protocol, Section 5.3 and redacted portions.

Pursuant to the Court's January 5, 2007 Order, GIS data, agricultural census data, sediment sampling locations, SOPs and sampling protocols must be produced. The State has offered no valid justification for why this information can be withheld in light of the Court's January 5, 2007 Order. The State should produce this information immediately.

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D. QAPPs and Validated Data Reports

Pursuant to the Court's January 5, 2007 Order, the State was required to produce all sampling, monitoring or testing documents, including documents relating to quality assurance and control and sampling protocols. The State, however, has not produced the following types of documents to date:

1. **Quality Assurance Project Plans.** We have not yet received a copy of the State's Quality Assurance Project Plans (QAPPs) for the sampling conducted to date.
2. **Validated Data Reports.** We have not yet received a copy of any validated data reports.

The above-described materials should be produced immediately.

IV. Incomplete Productions or Missing Information

In addition to the categories of information described above which the State has withheld entirely, we have identified numerous "gaps" or instances of incomplete or missing information within the documents already produced. As you know, the State has conducted its "rolling" production of "court-ordered" materials in an unorganized manner. We believe this disorganization by the State is intentional and designed to hamper the defendants' ability to efficiently review and analyze these materials. Nonetheless, defendants have done their best to wade through the shuffled morass of documents to confirm that the production is complete. We are disappointed to have now realized that the production is far from complete. The reminder of this letter describes areas of the State's production which appear to be incomplete:

A. GPS Coordinates and Sampling Location Information

Pursuant to the Court's January 5, 2007 Order, the State must provide the location of sampling for each instance of sampling, monitoring or testing.

Recall that defendants first raised concerns about the completeness of the State's production of sampling locations in February, 2007. See February 28, 2007 letter from R. George to L. Bullock. I wrote to you again concerning this subject of April 24, 2007. In response to those concerns, you finally responded in an April 25, 2007 letter that "with only some minor exceptions, we are confident that our production is complete as to coordinates" and that you would be "supplementing our previous production with coordinates from our sample sites..." but the "only exception to this will be the coordinates for the sediment sampling. It will be produced in the following month's production. The Bates numbers for the field notes

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concerning that sediment sampling are contained in OK-PL 5864-5946." See April 25, 2007 Letter from L. Bullock to R. George.

It was not until May 21, 2007 that the State finally produced additional sampling location information. See May 21, 2007 e mail from L. Bullock to R. George. However, to date, we are still missing GPS coordinates for the sediment sample locations identified on the State's privilege log and discussed in Section III(C) above and for the following samples:

Sample Id	Sample Id
SP-Jones-012307 filtered	GW-Madwell-012307 Non-Filtered
GW-Kindle-012307 Filtered	GW-McAlpine-012307 Non-Filtered
GW-Madwell-012307 Filtered	GW-Reese-012307 Non-Filtered
GW-McAlpine-012307 Filtered	GW-Jones-012307 Non-Filtered
GW-Reese-012307 Filtered	GW-Beaver-012207 Non-Filtered
GW-Jones-012307 Filtered	GW-IGO-012207 Non-Filtered
GW-Beaver-012207 Filtered	GW-McCoy-012207 Non-Filtered
GW-IGO-012207 Filtered	GW-E-Ames-012207 Non-Filtered
GW-McCoy-012207 Filtered	EOF-222-041307
GW-E-Ames-012207 Filtered	EOF-259-041307
SP-Jones-012307 Non-Filtered	RS-68-032907
GW-Kindle-012307 Non-Filtered	SD-001
SD-002	SD-03
SD-04	SD-04
SD-05	SD-07
SD-08	3*
0.02 Spring*	37824*
13861*	65461*
RS-0000114	RS-0000176
RS-0000222	RS-0000244
RS-0000322	RS-0000333
RS-0000337	RS-0000413
RS-0000419	RS-0000450
RS-0000675	RS-0000711

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Sample Id	Sample Id
RS-0000712	RS-0000785
RS-0009010	RS-0000017
RS-0000105	RS-0000356
RS-0000512	RS0000798

Samples denoted with an asterisk (*) in the above chart were identified in field notebooks produced by the State. *See* STOK0000937-STOK0001037. If the State has produced GPS coordinates for the samples identified in the table above, please direct us to where this information exists. Otherwise, the State must supplement its earlier production with the GPS coordinates for these sample locations.

In our attempt to review the data produced to date, it appears to us that different sample identifiers were used by the State for the same samples. The same sample may be referred to as a different number when used in a field notebook, compared to how it is reported in a lab sheet, and/or compared to how it is described when additional information is produced about that sample (such as GPS coordinates). For example, it appears that Sample Number 16837 in the State's field notebooks (*see* STOK0000937-STOK0001037), is referred to as Sample Number GW-40 by the State in relation to the lab reports and GPS coordinates for that sample. The use of multiple sample identifiers has prejudiced the defendants in their review of the data produced to date. While we understand that the State has produced some correlation information, to match up different sample identifiers, we do not believe the State has provided such correlation information for all samples and sample locations. Obviously, the State and its consultants have a key or chart that correlates sample numbers used in field notebooks with sample numbers shown on lab reports. Please produce a complete correlation table for all samples.

B. Missing SOPs

While the State has produced a number of written SOPs for the various sampling and testing conducted in the watershed, there are several types of work for which we have sampling data but no governing SOP. These include:

1. sediment cores collected by the State in 2005 (STOK0019558)
2. the sub-bottom survey conducted by the State (STOOK0019501)
3. the 2004 sediment grab sample collected by the State (STOK0019461)
4. the BIOSEP Bead data collected by the State (STOK0020402)

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5. the sediment toxicity samples collected by the State (STOK0015176) and
6. the DNA "fingerprinting" or microbial source tracking program.

If these SOPs exist, they must be produced.

C. Fish Kill Data

Field notebooks produced by the State refer to a fish kill in the Illinois River in April 2006, and entries note that algae, water, and fish samples were collected. The State should have produced all chemical analyses for the following samples, as well as all other fish data and fish information collected in the IRW:

ILL-FK-A1 (STOK0000089)
ILL-FK-P1 (STOK0000089)
ILL-FK-A2 (STOK0000089)
ILL-FK-P2 (STOK0000090)
ILL-FK-P3 (STOK0000090)
ILL-FK-P3 (STOK0000090)
ILL-FK-A3 (STOK0000090)

If the State did produce this information, please direct us to where the information exists. Otherwise, the State must supplement its earlier production to include this information.

D. Benthic Macro-invertebrate and Periphyton Data

1. **Complete Sampling and Location Information for Benthic Macro-invertebrates.** The State's SOP 7-3 (Benthic Macro-invertebrate Sampling) indicates benthic organism collection was planned using fine-meshed dip nets and benthic seines. The 2005 benthic macro-invertebrate field data sheets (STOK0016943-STOK0017146) contain selected handwritten notes such as "300 individuals picked from riffles" and "1 m² kick net" indicating that individual benthic samples were collected at these stations. While we have received notebooks containing tallies of benthic invertebrates at the family taxonomic level (STOK0000170-STOK0000256), it appears that we have not received complete benthic macro-invertebrate data. The State must produce all sampling and location information for each of these benthic collection sites and for all other benthic organism studies.

2. **Readable Benthic and Periphyton Data.** The handwritten notes produced regarding benthic and periphyton surveys conducted by the State are unreadable. We therefore

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request copies of the State's electronic version of these survey data for the following sample locations and any other sample locations where periphyton or benthic data were collected:

Periphyton and Rapid Periphyton Survey Data Station ID	Benthic and Rapid Bioassay Data Station ID
BS-08	BS-28
BS-117	BS-62A
BS-208	BS-HF04
BS-28	BS-HFS-22
BS-35	BS-REF2
BS-62A	BS-REF3
BS-68	
BS-HF04	
BS-HF28A	
BS-HFS-22	
BS-REF1	
BS-REF2	
BS-REF3	

E. Maps

The State must produce all maps created related to any sampling, monitoring or testing or conducted, including the following:

1. Sample Location Maps. The field notebooks produced by the State indicate that maps were available showing the station locations where samples were collected, but the maps were not produced. The State must produce any maps identifying sample locations.

2. Isopach Maps. With respect to the sub-bottom survey conducted by the State, the State has not yet produced the Isopach map that is mentioned in the electronic file produced by the State (Tenkiller Report.rtf (at pg. 1)).

F. Sediment Data (2004/2005)

It appears that the State has failed to produce complete sediment core data and other sediment sample data. The State must produce the following data, to the extent it exists:

1. 2005 Sediment Core Data. With respect to sediment cores collected by the State in 2005, the State has not yet produced:

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- data and sampling information for cores 00 and 05 (which are mentioned in field notes) (STOK0019572);
- particle size data for the cores; and
- the following appendices for the 2005 sediment core data reports:
 - Appendices 1, 2, 3, 6 (Core 1) (STOK0019574)
 - Appendix 6 (Core 2) (STOK0019651)
 - Appendix 2, 3, 6 (Core 3) (STOK0019774)
 - Appendix 2, 3, 6 (Core 4) (STOK0019859).

2. Incomplete Sediment Sample Data. It appears that we have not received all of the sediment sample data collected by the State. The identification numbers for the sediment samples go up to SD-515, suggesting that 515 samples were taken, but we only received data for approximately 117 sediment samples. Please confirm that only 117 sediment samples were analyzed or produce the results for the remaining 398 sediment samples immediately.

G. BIOSEP Bead Data

The field notes we received indicate that BIOSEP bead data has been collected (STOK0020402), but it does not appear that the State has produced this BIOSEP bead data. Pursuant to the Court's January 5, 2007 Order, this data should have been produced. The State, therefore, should either direct us to where this data is in the productions made to date or supplement its earlier productions with this data.

H. Incomplete Automated High Flow Sampling Data

In SOP 2-1, the State references its plan to use ISCO automated samplers to: 1) directly measure and summarize flow-weighted concentrations of key pollutants of concern associated with runoff events in small watershed tributaries, and; 2) investigate potential correlations between these concentrations and land use characteristics, poultry operations, and storm event hydrograph characteristics. While we received velocity data from this sampling effort, we have been unable to locate storm hydrographs that provide height and width information or direct width measurements taken at the ISCO samplers in the State's production. Without this information, it is impossible to interpret the State's reported results. The State, therefore, should either direct us to where this data is in the productions made to date or supplement its earlier productions with this data.

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I. QA/QC Lab Packages

While we recognize that certain QA/QC information has been produced by the State, it does not appear that the State has produced QA/QC reports for all samples analyzed for each lab. The State must direct Defendants to where complete QA/QC information may be found within the State's productions to date or immediately supplement its production with QA/QC lab packages for each sample analyzed.

J. Chain of Custody Forms

It appears that the State has not produced complete chain-of-custody forms for its labs (GEL, Aquatic Research, Inc, Aquatec Biological Services, Great Lakes Environmental Center, Alpha Woods Hole Analytical, Water's Edge Scientific, Jeff Janik, and Reservoirs Environmental) for all samples collected and analyzed. For example, attached to this letter is a lab report from Great Lakes Environmental Center for which we are unable to locate a corresponding chain of custody form. This is merely one example of many instances in which we have been unable to find chain custody forms. The State must produce all chain of custody forms for all samples analyzed or direct us to where they are located in the information produced to date.

Again, we recognize that it is possible that we have overlooked some data that may have been produced by the State due to the format in which the information was produced. The defendants therefore request the opportunity to meet and confer with the State about these issues next week. To the extent the State has already produced any of the information described above, we ask that you please direct us to where the information is located in the documents and files the State has produced to date. To the extent the information described above has not been produced and the State is unwilling to produce it immediately, we regrettably will have no choice but to file a motion to compel compliance with the Court's January 5, 2007 order.

We would appreciate your response to these concerns as soon as possible including, of course, a proposed date and time when we might meet and confer concerning these issues. I look forward to your response.

Sincerely,



Robert W. George

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Cc: Counsel of Record (via e mail)



Attorneys and Counselors

September 19, 2007

Robert George
Kutak Rock LLP
214 W Dickson St
The Three Sisters Building
Fayetteville AR 72701-5221

(Via email and FedEx)

Re: *State of Oklahoma v. Tyson et al.*,
No. 05-CV-0329-TCK-SAJ

Dear Robert:

Your letter of August 29, 2007, incorrectly characterizes the Plaintiff's production of its sampling data. Your charge that we did not complete our production as ordered, but "dribbled information and materials out to the defendants in seven separate installments" is a gross mischaracterization of our production. While it is true that there have been repeated supplements of our initial production, this is because as new data has been developed, it has been produced. It is our intent to continue to produce the data as it becomes available from our scientists until all of the data is produced.

Frankly, I do not understand your complaint that it is prejudicial to the Defendants for us to provide you the data at the point where it completes our internal QA/QC review. It is only at that point that the data becomes available to our scientists and eligible for inclusion in their analysis. The suggestion that Defendants are prejudiced unless they get data before Plaintiff's own scientists receive it is absurd. By providing it to you in this manner, we are meeting both the spirit and the letter of the Court's order.

As for your more specific issues, I will address them in the order in which you raised them:

III. Categories of Sampling Data and Materials Allegedly Being Withheld:

A. DNA/Microbial Source Tracking Test Results

I have discussed with my client the issue of whether to claim a proprietary interest in this method. While it is the result of what are well-established scientific methods, the application of these methods to tracking bacteria from poultry waste as it moves through the environment appears to be a significant advance in the traditional ways of tracking such waste. Even so, my client has determined not to make a proprietary claim on this

method. There may be other states or municipalities who might wish to use this method to help them hold your client or other poultry integrators accountable for the damage done to their waters by the waste disposal methods employed by Tyson and others. The State has determined that it will not act in a manner to diminish such use.

We have now completed the process of using accepted scientific methods investigating the possible use of DNA to track poultry waste as it moves through the watershed. We have not yet determined whether we will offer any proof at trial or file an expert report concerning this method. It remains our view that federal law does not require the production of any of this information or the resulting analysis. This is classic attorney work product. Even so, without waiving our objections, I have enclosed with this letter the Standard Operating Procedure relating to the collection of samples related to this analysis. See SOP Section 5.3 on attached Disc STOK_CD18. Regarding your request for the data produced and the method used, I have received a report, but need to consult with the experts to assure that it is responsive to your request. I have scheduled a conference call with them for Friday. After that conference, I will report to you and hopefully be in a position to provide the information which you have requested.

At this time, I am not producing the reports concerning the process used in developing this method. That process is work product and involves the opinion of experts. The Court has not ordered the disclosure of that opinion. It has set a deadline for the production of expert opinion. If we decide to offer this in evidence, the expert opinion will be offered at that time. **I want to be clear that, in making this production, we are not waiving our claim of attorney work product and will not provide any discovery as to the expert opinions concerning the development of this method, its validity or the validity of the data produced until the date for filing expert reports.** That will be done only if we determine to offer an expert opinion relative to the use of this method.

Contrary to your assertion of prejudice by the timing of this production, providing this information and data at this time is a great benefit to the defendants. It is well in advance of the Court's schedule for the production of expert reports and will give you an advanced look at what might be presented to the Court.

B. Sediment Geoprobe Groundwater Sampling Data:

You appear to be under a misperception that our Geoprobe work has been directed at collecting sediment cores. We have not collected or analyzed sediments in connection with our Geoprobe sampling and therefore you will not be receiving any analysis of sediments from this effort. We have collected some water samples; and when the data has completed our internal QA/QC review, it will be provided. I checked with the CDM lab and they have not received the completed reports from the outside labs. In response to your great interest in this data, the CDM lab has asked the labs to expedite their processing of the water collected. I will provide that at the earliest possible time.

C. Data and Sampling Documents Still Listed on the State's Revised Privilege Log:

Item No. 213: This is a reference to the data which comprises the aerial photograph of the IRW which was provided to you in the February production. As explained in my February 1, 2007 letter, we produced it in the native format and informed you at that time that it could be viewed using either Arc View or Arcgis software. This will be removed from the privilege log.

Item No. 214: The digital data, analysis of agricultural census authored by Lithochimeia, is just that. It is the analysis of agricultural census data published by various government agencies. The data which was analyzed is generally available. This is classic work product and, to the extent that it is required to be produced, it will be produced when the expert reports are filed. Under the Court's order and the Federal Rules, you are not entitled to such analysis at this time.

Item No. 215: Field notes relating to the sediment sampling locations in 2005. Those were produced and you will find those at OK-PL 3947-4332. This will be removed from the privilege log.

Item No. 216. Regarding the photographs and digital photographs with included text, I believe that those were included in the previous production. In order to insure that you have received them, I am including a copy of them with this letter. See Disc STOK_CD17 (28825-28850). We will amend the privilege log to reflect this.

Item No. 217: An un-redacted Standard Operating Procedure, including Section 5.3, is being produced as indicated previously. See attached Disc STOK_CD18 (20762-20970). We will amend the privilege log to reflect this.

Item No. 218: See above.

D. QAPP and Validated Data Reports:

1. Quality Assurance Project Plans: The Plaintiff does not have a formal QAPP plan. QA/QC is provided in the lab reports.
2. Validated Data Reports: We do not have a Validated Data Report. Our QA/QC procedures provide the needed review of data.

IV. Alleged Incomplete Productions or Missing Information:

- A. GPS Coordinates and Sampling Locations Information: As your letter indicates, on May 21 we provided you with the coordinates for approximately 354 sampling locations. As to the locations which you have questions about, I have made inquiries and will provide the information to you as soon as it is received.
- B. Allegedly missing SOP's:

1. Sediment Cores collected in 2005. You will find the SOP for that at STOK 22211-22219 which was produced in March 2007.
2. Sub-bottom survey. This was conducted by a subcontractor and we do not have an SOP for that survey.
3. 2004 sediment grab sample. The protocol for that sample is attached. See Disc STOK_CD17 (28822-28824).
4. BIOSEP data. There was not an SOP for the collection of the BIOSEP data.
5. Sediment toxicity samples. The SOP for that is contained in the report from the lab
6. DNA fingerprinting. As discussed above, it is being produced.
- C. Fish Kill Data: You will find attached a report by Jeffery Janik (STOK_CD18, 28821) and a spreadsheet with the relevant data (STOK_CD18, 29425-29427). This comprises all of the data analyzed related to this fish kill.
- D. Benthic Macro-invertebrate and Periphyton Data:
 1. Sampling and Location Information: The additional data which was not included is being assembled and will be provided.
 2. Readable Benthic and Periphyton Data: You indicate that some of the data sheets regarding this are unreadable. If you will indicate which ones, I will see that you have readable information.
- E. Maps:
 1. Sample Location Maps. It is not clear what you are referring to when you reference maps. We have previously provided the aerial photo, and the blowups of that photo on which the sampling grids for soil sampling were laid out. As you indicate, you have also found maps in the field books. For example, in the Field Books for the 2005 Sediment Sampling, which you apparently overlooked, there are numerous maps. We did not keep road maps and other driving directions. I believe that we have produced all of the maps which were retained as part of our sampling program.
 2. Isopach Maps. The Isopach Map is attached. See Disc STOK_CD16.
- F. Sediment Data (2004/2005)
 1. Sediment Core Data: There was no analysis of Cores 00 and 05. Similarly, there has not been any particle size data collected as to the Cores. As for the

Appendices, I have attached a complete copy of the reports and the appendices. See STOK_CD17 (28872-29424).

2. Incomplete Sediment Sample Data. Your letter suggests that you understand there were up to 515 possible sediment sampling locations that were considered. As indicated by your analysis, we analyzed only approximately 119 samples from these locations. You have all of the data concerning the analysis of these samples.
- G. BIOSEP Bead Data: This is attached. See Disc STOK_CD17 (28851-28871).
- H. Automated High Flow Sampling Data: The height and width information which you seek is in the field books.
- I. QA/QC Lab Packages: We are reviewing all of the labs which you listed suggesting incomplete QA/QC reports. We will supplement to the extent that any of the reports are missing this information.
- J. Chain of Custody: Other than pointing to one instance, you do not identify where there is not a complete chain of custody. In spite of that, we are conducting a complete review of this and will provide chain of custody information where needed.

We have produced a massive quantity of data and, contrary to your assertions, it has been well organized and presented in a timely manner. It is true that due to the fact that it has been produced as it has been developed, it has not been organized as it would have been had you waited for the data to be completely assembled and then produced. It is also true that we have not done the data entry task for you. But even there, we have assisted you to a great extent by providing a spread sheet with the sample identifications and locations; and consistent with that, we will provide information concerning the sample locations you asked about. I am confident that we have met not only the letter but the spirit of the Court's order.

If, after reviewing this letter, you conclude that it does not answer your questions adequately, we should schedule a meet and confer so that we have an opportunity to fairly resolve your concerns.

Sincerely,



Louis W. Bullock

KUTAK ROCK LLP

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WICHITA**

November 30, 2007

VIA ELECTRONIC MAIL

Louis W. Bullock
Miller, Keffer, Bullock & Pedigo LLC
222 S. Kenosha Avenue
Tulsa, Oklahoma 74120

Dear Louis:

Re: Oklahoma, et al. v. Tyson Foods, Inc., et al.,

The State's strategy of delayed and piecemeal productions of data and test results continues to prejudice the Defendants' ability to investigate and defend against the State's claims. This prejudice has now been compounded by the State's recent filing of a Motion for Preliminary Injunction supported by opinions from experts purportedly based on sampling, testing and investigation conducted by the State in the Illinois River Watershed ("IRW"). Defendants can no longer accept any delays or incompleteness in the State's production of the information which you were ordered to produce by February 1, 2007.

In my letter dated August 29, 2007, Defendants raised serious concerns regarding the status of the State's "court-ordered scientific production." Despite the assurances in your response letter dated September 19, 2007 many of these concerns have not been satisfactorily addressed. Notably, in your letter, the State made promises to produce certain identified missing information but failed to indicate when such information would be produced. Nearly two months have now passed, and the promised supplementation has not yet occurred. This delay is unacceptable. Also, although your letter vaguely referenced prior productions where certain missing information reportedly could be found, the State did not specify where such information was actually located. The State's failure to identify precise Bates ranges or adequately describe where the requested information can be found continues to cause unnecessary problems. The Court has consistently found that the State has failed to be sufficiently specific in producing documents to Defendants, and this pattern of behavior must cease.

As explained further below, we ask that by the December 7, 2007 you 1) supplement the State's prior productions with the identified missing information, or 2) specify where in the data

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produced to date such information exists. We also ask that you specify what information in the data produced to date you claim is responsive to prior discovery requests.

I. Information The State Indicated It Would Produce That It Has Not Yet Produced.

In your September 19, 2007 letter, you indicated that the State would supplement its earlier production to correct for several identified deficiencies. Approximately two months have now passed, and we have yet to see this promised data. In particular, you indicated that the following data or information would be produced:

1. Geoprobe groundwater sampling data;
2. Sampling and location information for the benthic macroinvertebrates and periphyton data; and
3. A complete set of QA/QC lab packages.

This information should be produced immediately. If there is any reason the information cannot be produced in the next few days, please inform us of a date certain by which you will produce the data. In addition, with respect to the missing QA/QC lab packages, if you are unable to produce a complete set at this time, we expect written confirmation that a complete set for the existing data has already been produced such that no further supplementation will be made.

Likewise, with respect to the benthic and periphyton data produced, Defendants informed you that it was not in a readable format. In response, you indicated that if we identified the unreadable pages, you would see to it that readable information was produced. The pages Bates-numbered with ranges STOK0016943-0017146 are the pages that are unreadable. For example, on the attached page STOK0016966, the tally marks and names listed are illegible. Further, the information is nonsensical in the current format inasmuch as you provide no key or explanation regarding the notations. As previously requested, the benthic and periphyton data must be immediately produced in a readable, useable format. Please provide us with a date certain when the State will supplement its earlier production with this information.

II. The State Has Failed To Produce Other Identified Missing Information.

In addition to failing to supplement the data as promised, the State has also failed to adequately respond to the following concerns we previously identified:

1. The Court's Order Includes Production of Raw Data, Not Just QA/QC data. As soon as the State's laboratories generate raw data, that data should be produced to Defendants pursuant to the Court's January 5, 2007 Order. Nothing in that Order

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suggests that the State can limit its production to QA/QC'd data only. Defendants are concerned that the State is attempting to use the QA/QC process to delay production of data, as Defendants are entitled to begin reviewing the State's raw data as soon as it is generated. If the State chooses not to share such data with its own experts, that is its own choice, but that decision does not alter the State's obligations under the January 5, 2007 Order to promptly produce such data to Defendants. Please immediately produce all outstanding raw data.

2. Incomplete DNA/Microbial Source Tracking Data. In correspondence dated October 19, 2007, you indicated that the sampling methodology conducted by the DNA/Microbial Source Tracking is in the field notebooks. Please direct us to the specific pages that contain this information. Also, the State continues to provide Defendants with only bits and pieces at a time of the DNA/Microbial Source Tracking data it appears to have collected to date. While you have produced some analytical data, such data appears to be summary data as opposed to a complete set of data collected and analyzed to date. Please either immediately supplement your prior productions with a complete set of the data collected for purposes of the State's DNA/Microbial Source Tracking efforts or confirm that no other such data exists at this time.
3. Missing GPS Coordinates. With respect to the GPS coordinates, you stated in your September 19, 2007 letter that you would provide information to us as soon as you received it. As of the date of this letter, we are still missing GPS coordinates for sampling station SD-005 referenced at Bates page STOK0000920. The State must either immediately produce the location information for this station or confirm that no data was ever collected from this location.
4. Agricultural Census Data. Item No. 214 on the State's privilege log indicates that the State has collected and analyzed certain agricultural census data. However, no specifics are given regarding the nature of that data (e.g., what years, species, etc.). The State has asserted work product protections against the production of the analysis of this data. Regardless of whether the State agrees to produce the analysis of this data, the State must immediately produce the underlying data itself, which the State has collected and reviewed. Raw facts cannot be protected under the work product doctrine.
5. Correlation chart. Defendants previously requested that the State produce a key or chart correlating sample numbers used in field notebooks with sample numbers shown on lab reports. This is necessary because the State appears to have assigned multiple identifiers to the same samples. This use of multiple sample identifiers has prejudiced Defendants in their review of the data. The State has not provided any justification for why multiple identifiers were used or why it has

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Page 4

not produced a correlation chart for all samples. Please produce a correlation chart immediately.

6. Automated High Flow Sampling Data. With respect to the automated high flow sampling data, you indicated that the height and width information was in the field notebooks but did not identify particular pages where such information is located. This statement was not responsive to the concern we identified because the notebooks provide speed and depth but not width. As an example, on page STOK0019428 (attached) there is a height and depth value (in feet) and a velocity value (in feet per second), but the width is not provided. As explained in our earlier letter to you, we have been unable to locate storm hydrographs that provide height and width information or direct width measurements taken at the ISCO samplers. If this information is in the field notebooks, as you assert in your last letter, please immediately direct us to precisely where the width information is recorded. Otherwise, please immediately supplement your prior productions with this information.

Pursuant to the Court's January 5, 2007 Order, the State must produce this information immediately – as this information should have been produced last February. To the extent you are unable or unwilling to produce this data within the next few days, the parties must schedule a meet and confer.

III. The State Has Failed To Specify Where In Its Scientific Production Responsive Information Exists.

Defendants continue to be concerned, moreover, with the unorganized production of the data in this case and the State's refusal to specify where relevant information exists within the data set that has been produced. As highlighted above, in response to our August 29 letter, the State merely responded that certain responsive information had already been produced, but the State did not specify where (*e.g.*, at what Bates page) the responsive information was located. Likewise, the State has improperly responded to numerous Defendant's discovery requests by asserting that responsive information is contained in the court-ordered scientific production without pointing to where in the scientific production such responsive information is located.

In numerous responses to written discovery served by the defendants, the State has simply referred defendants generically to "documents included in the State's February 1, 3, and 8, 2007 document production and subsequent updates produced pursuant to the Court's January 5, 2007 Order." *See, e.g.* Responses to Cargill, Inc.'s Interrogatory Nos. 9 and 13; State's Supplemental Responses to Tyson Poultry Interrogatory Nos. 4 – 8; State's Supplemental Responses to Cobb-Vantress Interrogatory Nos. 4, 8; State's Supplemental Responses to Tyson. The Court has repeatedly directed the State to specify with particularity what documents or information it believes are actually responsive to the discovery requests at issue. (*E.g.*, Order of

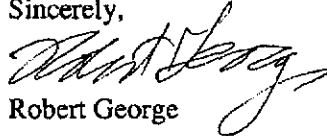
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Louis Bullock
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May 17 at 5-7 (regarding hardcopy documents); Order of Oct. 24, 2007 at 5 (regarding items listed on privilege logs); Order of Oct. 24, 2007 at 9 (regarding ESI).) The State cannot merely point to unorganized data sets or multiple boxes of information not produced in the ordinary course of business as places where Defendants can go search to find an answer. We therefore ask that the State supplement all prior responses to written discovery which include generic references to the State's court-ordered, scientific production to specify where in the scientific production responsive information can be found.

Please let me know how the State intends to proceed with respect to these issues. The State's recently served Motion for Preliminary Injunction of course make resolution of these issues all the more urgent. If Defendants' above-mentioned concerns are not fully and adequately addressed by December 7, 2007, the parties will need to schedule a meet and confer and, if necessary, bring the appropriate motion. Please be advised that if we are unable to resolve these issues soon, we intend to seek assistance from the Court.

Sincerely,



Robert George

cc: All Counsel of Record (via e mail)

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APPO51 Count BY F02 0733

APPO41 Shows Area w sample 0733

APPO36 Shows Area w sample 0738

STOK0019428



Attorneys and Counselors

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Tulsa OK 74119-1031
918-584-2001
Fax: 918-779-4383

December 19, 2007

Robert George
Kutak Rock LLP
214 W Dickson St
The Three Sisters Building
Fayetteville AR 72701-5221

(VIA EMAIL ONLY)

Re: *State of Oklahoma v. Tyson et al.*,
No. 05-CV-0329-GKF-SAJ

Dear Robert:

In an effort to assist you in interpreting the information you have received, and in response to your letter of November 30, 2007, I am providing the following:

A. Information Previously Requested:

1. Geoprobe groundwater sampling data has been provided in the same manner as the other data. You have received the field book documenting the sampling and the locations at which the samples were taken. See Bates Numbers STOK 25748-25792. In the normal course of producing lab data, you have also received the sampling results as the samples have completed our internal QA/QC. Those productions are contained in the results obtained from Environmental Microbiology Laboratory, Aquatic Research Inc., and A&L Laboratory. They bear a GP-GW ### sample designation.

2. I thought we had provided the sampling and location information for the benthic macroinvertebrates and periphyton data. Apparently, I was mistaken. We will get it to you promptly. In light of your suggestion that the urgency of your request is based upon the Plaintiff's Motion for a Preliminary Injunction, it is important to note that this data is not relevant to that motion. In spite of this, we will provide this data promptly.

3. I believe you have all of the QA/QC documents, but if you could specify which you believe you are missing, I will attempt to run them to ground.

Robert George
December 19, 2007
Page 2

B. Other Information Allegedly Requested But Not Produced:

1. Requested "Raw" Data Prior to Internal QA/QC: Perhaps it would help if I explained in greater detail the purpose of our internal QA/QC review. The purpose of this internal process is, in part, to insure that the information is complete before it is sent out. This includes assuring that we have the QA/QC results from the individual labs and the chain of custody information, and that it is indexed so it can be provided to our scientists and produced to you in an orderly manner. NO DATA is being withheld nor will any be withheld as the result of this process, and no results have been or will be changed as a result of this internal QA/QC procedure. Providing the data prior to this process will only invite chaos and confusion. You have unfairly complained about the organization of our production. Complying with your demand that we provide this data without the organization provided by our internal QA/QC process will only serve to raise the possibility that there will be some validity to your complaints. Finally, the Court's Order does not require us to change our procedures. It only requires us to give you the data, and we are doing that.

2. DNA/Microbial Source Tracking Data: We will fully comply with the Court Order requiring us to provide both the information relied upon and the information considered at least 21 days prior to Dr. Harwood's deposition. To the maximum extent possible we will provide this information in advance of that date. I understand that some of this information will be produced later this week. As part of the effort to provide you this information, a report is being completed to provide the details of the lab procedures and the results of those procedures. My understanding of this report is that it should be responsive to your inquiry. Dr. Harwood is in New Zealand at the moment which is delaying the completion of that report. I will provide you a date for producing that report as soon as possible. Once you have reviewed it, we can discuss whether other information is needed.

3. GPS Coordinates: I previously provided you with a spread sheet concerning all of the GPS coordinates which you reported having difficulty locating. I was able to provide coordinates for the majority of those. In those limited instances where we were unable to provide coordinates, it was due to the fact that the sample identification name about which you inquired did not reflect our sample numbering system. We do not know if your staff misread the sample designation; if the writing in the log book was difficult to read; if one of our scientists made an entry error; or if there was some other cause for your difficulty. Therefore, the comment column in the spread sheet asks for information that would help us determine the actual sample ID number and its coordinates. For example, SD-05 is not one of our sample designations. As a result, we asked for a reference to either the collection date or the lab where you found the reference. You have not provided any of that information, making it impossible for us to further assist you. Please provide that information so we can fully respond.

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4. **Agricultural Census Data:** The census data is publicly available data. We are not hiding any "raw facts." Your experts can review the agricultural census data and select that which they believe to be relevant, the same as we can. As I stated previously it was the analysis of that data which we were protecting as work product. That issue aside, you will receive this data as part of the information relied upon or considered by Dr. Fisher.

5. **Correlation Chart:** In light of the inquiry above regarding GPS Coordinates, it appears that you have been able to do the same work that we have done, correlating data with actual sampling events. I am still of a view that there is nothing in either the Court's Orders or the federal rules which requires us to do this for you. However, I am open to discussing a possible exchange of these charts -- sort of a, you show us yours and we will show ours. Let me know if such a discussion might bear fruit.

6. **Automated High Flow Sampling Data:** In order to expedite this matter, I am having a chart made with the width data that you have requested.

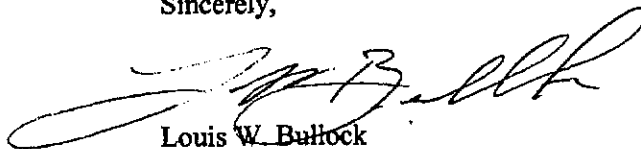
C. The Responsiveness of the State's Production:

Your complaints concerning the quality of our production and its "responsiveness" to the discovery served on the Plaintiff by the Defendants are again ill founded. It is true that we have produced the data as it has become available resulting in the Defendants receiving it in pieces rather than in one completed package. This has resulted in your receiving it much in the same manner as the Plaintiff has received it.

The Court did not require us to provide Defendants with our analysis of the data, and we have not. At least we did not do so until we filed the Motion for Preliminary Injunction at which time you did receive affidavits containing our experts' analysis relative to the bacterial contamination of the Oklahoma portion of the IRW by your clients and the other Defendants. At the same time, we have pointed to the data as being relevant to certain questions which have been asked relative to our case. While Defendants understandably wish for us to set out our entire expert case before the time set by the Court for the filing of such reports, that is not required. With the experience and sophistication of the Defendants, even in the face of their claims that they are unable "after reasonable inquiry" to discover such things as whether the feces from their poultry contains any pathogenic bacteria, I am confident that they are quite capable of connecting the dots.

I trust this letter is fully responsive to your requests.

Sincerely,



Louis W. Bullock